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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 479

OCEAN DRILLING & EXPLORATION COMPANY,
Petitioner

versus

SIGNAL OIL & GAS COMPANY, ET AL
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, Ocean Drilling & Exploration Company, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in these proceedings on April 6, 1970.

OPINIONS BELOW

The Opinion of the United States District Court for the Eastern District of Louisiana entered herein on Dec. 20, 1968 is reported at 294 F. Supp. 1025. It appears in the record at pages 1040-1061 and is printed in Appendix "A" hereto.

The Opinion of the United States Court of Appeals for the Fifth Circuit dated April 6, 1969 is reported in 424 F.2d 684 and reproduced in "Appendix "B" hereto, together with the Order denying the Petition for Rehearing.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on April 6, 1970 and a timely petition for rehearing was denied on May 13, 1970. This Petition for Certiorari is filed within 90 days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Whether the rule of comparative fault applies in a non-collision case in admiralty.

(2) Whether the Court of Appeals for the Fifth Circuit in not applying the rule of comparative fault failed to follow the opinion of this Court in *United States v. Seckinger*, (1970) U.S. , 90 S.Ct. 888.

STATEMENT OF THE CASE

On October 29, 1965 Ocean Drilling & Exploration Company (Odeco) entered into a "Drilling and Rework Contract" with Signal Oil & Gas Company (Signal) pursuant to which Odeco agreed "to drill and complete for Company (Signal) a well" located in Block 106 of the Eugene Island Area of the Gulf of Mexico. The location of the well was defined as "6700 feet South and 400 feet West of the Northeast corner of the Eugene Island, Block 106". Signal undertook to furnish the necessary

towing to move Odeco's Drilling Barge MR. CHARLIE onto the location and to survey, stake and mark the location and obtain the necessary permits, rights of way, etc. Pursuant to these undertakings, Signal employed an independent surveying firm to fix the location of the proposed well and place a buoy there and the necessary tugs to move the MR. CHARLIE to location in Block 106.

The Drilling Barge MR. CHARLIE is a submersible type barge which is placed on location by flooding its lower hull with water and is raised from location by pumping water from the lower hull. This involves problems with the stability of the barge, both going onto and coming off locations as well as during the towing between locations. Odeco, accordingly, provided a barge mover to raise the barge from location, to maintain stability during the voyage and to flood the tanks and place the barge on location. One of the survey crew employed by Signal boarded the barge and stationed other men in the vicinity with surveying equipment to radio information to the MR. CHARLIE to enable her to get to the proper location. Following the instructions furnished by the surveying party, the Odeco barge mover put the barge on location, the derrick was raised and drilling began. Sometime thereafter it was ascertained that the barge was in the vicinity of a pipeline owned by Transcontinental Gas Pipeline Corporation (Transco) and upon investigation by divers it was ascertained that the barge was, in fact, on the pipeline. Drilling was immediately stopped and the barge raised and moved to another location.

Transco filed this action *in rem* against the MR. CHARLIE in the United States District Court for the

Eastern District of Louisiana, New Orleans Division. Odeco claimed the MR. CHARLIE, filed answer and a third party complaint against Signal and its co-venturers in the well. The District Judge held that Signal was negligent in failing to check for underground pipelines before moving the barge onto location; that Odeco was also negligent; but that Odeco's negligence was minor with respect to Signal's major fault; that Signal was not entitled to indemnity under the "Drilling and Rework Contract"; but that Odeco was entitled to indemnity because of the breach by Signal of its contractual obligation to stake, buoy and mark the location, obtain the necessary permits, rights of way, etc. It is important to note that though the District Court found Odeco negligent, it remarked that such negligence was "small"; that the "entire responsibility to (Transco) rests in this Court's judgment on Signal"; and that "it wasn't Odeco's negligence that was responsible for setting her down there." Both Signal and Odeco appealed to the United States Court of Appeals for the Fifth Circuit and on April 6, 1970 that Court handed down its opinion holding that both Signal and Odeco were guilty of negligence which contributed to the casualty; that the "Major-Minor Fault Rule" was not applicable because the cause did not involve a "collision" between vessels; that Signal was not entitled to indemnity because the indemnity provisions of the Signal-Odeco contract did not include the "talesmanic words" or indicate a clear intent to require Odeco to indemnify Signal against its own negligence; that Odeco was not entitled to indemnity under *Ryan* (implied warranty); and that neither party was entitled to indemnity on a tort theory because" (Signal) and (Odeco) were in *pari delicto* ***" — this despite the finding of the District Court that Odeco's "small negli-

gence" was not sufficient to require Odeco to "shoulder half the blame for this casualty".

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals for the Fifth Circuit failed to apply the Comparative Negligence Rule

The Court of Appeals held that this case involving contact between a drilling barge and an underground pipeline was not a "collision" case which would bring into play the Major-Minor Fault Rule. This holding is questionable. If this case involved a "collision" certainly there is justification at this date and time for applying the rule of camparative negligence rather than equal division of damages to collision cases. The equal division rule has been criticized by lower Federal Courts and text writers. See ,for example, Gilmore & Black, *The Law of Admiralty*, p. 441 and *Baer, Admiralty Law of the Supreme Court* (2nd Ed.) p. 222 *et seq.* All maritime nations other than England and the United States subscribe to the Brussels Collision Convention of 1910 providing for allocation of collision damage in proportion to fault. Why a comparative negligence rule is to be applied in our admiralty courts in personal injury and death claims and not in collision claims involving property damage is somewhat hard to justify. This Court has recently overruled *The Harrisburg*, 119 U.S. 199 and held that the General Maritime Law does afford a remedy for death. *Moragne vs. States Marine Lines, Inc.* (1970) 38 Law Week 4498. *The Harrisburg* was said to have been of questionable validity at the time of its announcement and we submit that the rule of equal division of dam-

ages in collision cases is equally suspect. See the critique of this rule in Gilmore & Black, *The Law of Admiralty*, p. 438 *et seq.*

Assuming, however, that the Court of Appeals was correct in holding that the contact between the drilling barge and the pipeline was not a "collision", there is no justification for applying the rule of equal division of damages.

Although there are some lower court opinions which would suggest that in property damage cases in admiralty, whether collision or not, damages should be divided equally without reference to degree or fault, such a suggestion is questionable in view of this Court's opinion in *Halcyon Lines vs. Haenn Ship Ceiling & Refitting Corp.*, 1952, 342 U.S. 282, 72 S.Ct. 277 where the Court said:

> "Where two vessels collide due to the fault of both, it is established admiralty doctrine that the mutual wrongdoers shall share equally the damages sustained by each, as well as personal injury and property damage inflicted on innocent third parties. This maritime rule is of ancient origin and has been applied in many cases, *but this Court has never expressly applied it to non-collision cases*". (Emphasis supplied)

The comparative negligence approach has recently been adopted by the United States Court of Appeals for the Third Circuit in the case of *Gomes v. Brodhurst*, (C.A. 3, 1968) 394 F.2d 465 — a non-maritime case. Plaintiff sued two parties one of whom shortly before trial settled with plaintiff and took a "Covenant Not To Sue" in consideration of a payment of $9,750.00. The action was tried to a jury with both defendants in the case. The

covenant was not mentioned to the jury. A verdict against both defendants for $50,000 was returned. The District Judge reduced the verdict by $9,750.00 and entered a judgment for the balance against the non-settling defendant. This party appealed claiming that the covenant ran in his favor. The Third Circuit affirmed, but on rehearing, considered the question: "To what extent, if at all, should the judgment against appellant be reduced to reflect any right of contribution he might have." The Court found that there was no right of contribution under the *lex loci*, but nevertheless proceeded to consider the issue mentioned above because:

> "After extended consideration, however, we have have decided that there is no compelling reason to defer or deny applying what we deem a rule of reasoned fairness. There is no longer a legitimate place in our system, if indeed there ever was, for a rule of law which places the full burden of restitution upon one who is only in part responsible for a plaintiff's loss."

After a thorough and erudite review of the law and the effect of employing a comparative negligence approach the Court held that liability should be imposed on joint tortfeasors "in proportion to their comparative negligence", and said:

> "We might add that the introduction of the doctrine of comparative negligence to a settlement and contribution context is not novel. The Uniform Act of 1939 recognized it to a limited extent in an optional paragraph of Section 2 which reads. 'When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the rela-

tive degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares.' And some states have enacted into law the theory of comparative negligence as among joint tortfeasors. See, e.g., Ark. Stat. Ann §32-1002(4) (1962) Hawaii Rev. Laws §246-11 (1955); S.D. Code §33.04A03(4) (Supp. 1960). "Nor by announcing such a rule judicially do we think we display a particular boldness. The Supreme Court of Wisconsin took the important step before us in *Bielski v. Schulze*, *supra*. Concedely, the Wisconsin court emphasized how natural such a step was given its long experience with statutory comparative negligence as between plaintiffs and defendants and its possession of procedural and practical devices allowing for meaningful implementation. See also Note, 63 Colum. L. Rev. 380 (1963).

"But we do not view the functioning of juries in Wisconsin and the Virgin Islands as so different that judicial pronouncement of the comparative negligence doctrine, successful in one, must be unworkable in the other. Indeed, the Wisconsin comparative negligence statute, Wis. Stat. Ann. §331.045 (1958), limited as it is to the effect on defendant's liability of plaintiff's contributory negligence does no more than legislate the simple idea of partitioning fault. The relevant background then,, is not statutory but decisional, as evidenced by the some seventy pages of annotations following the statement of the act."

"We accordingly grant the petition, reverse the judgment of the district court, and remand the cause for a new trial limited to determining, under proper instructions, the proportion of the damages for which appellant should be held responsible. If his negligence is found to be less

than the percentage which the verdict diminished by the settlement bears to the total verdict, the judgment against him shall be correspondingly reduced. If more, it shall be increased, since to do so would in effect give appellee more than the total damages to which he is entitled."

Such an approach would not constitute "boldness" in this case for the concept of comparative negligence has long been recognized in the admiralty. *Gilmore & Black, The Law of Admiralty*, §7-20; *The Max Morris* (1890) 137 U.S. 1, 11 S.Ct. 29.

II.

By Failing to Follow the Opinion of this Court in *United States v. Seckinger* (1970) U.S. 90 S.Ct. 880, the Court of Appeals Improperly Denied Indemnity to Odeco.

In denying indemnity to Signal under the Signal-Odeco contract and in denying indemnity to Odeco under theories of implied warranty and tort indemnity for the reason set forth in the Court's opinion, we suggest that the Court fell into inadvertent error and disregarded this Court's opinion in *United States v. Seckinger*, U.S. , 90 S.Ct. 880. Seckinger involved an agreement in which a contractor undertook to indemnify the government "for all damages to persons * * * that occur as a result of his [the contractor's] fault or negligence * * *". In a suit by an injured employee of the contractor, the United States was found negligent and liable for damages. The United States then sought indemnity in a subsequent action from the contractor. This Fifth Circuit "held that the provision [quoted above] could not be construed to allow the Government to recover

from the contractor damages suffered by the Government on account of its own negligence." The Supreme Court reversed and remanded, saying:

> "A synthesis of all of the foregoing considerations leads to the conclusion that the most reasonable construction of the clause is the alternative suggestion of the Government, that is, that liability be premised on the basis of comparative negligence. In the first place, this interpretation is consistent with the plain language of the clause, for Seckinger will be required to indemnify the United States to the full extent that its negligence, if any, contributed to the injuries to the employee.
>
> "Secondly, the principle that indemnification for the indemnitee's own negligence must be clearly and unequivocally indicated as the intention of the parties is preserved intact. In no event will Seckinger be required to indemnify the United States to the extent that the injuries were attributable to the negligence, if any, of the United States. In short, Seckinger will be responsible for the damages caused by its negligence; similarly, responsibility will fall upon the United States to the extent that it was negligent."

Problems of indemnity are facing counsel, the District and Appellate Courts in the Fifth and other circuits almost daily, particularly in the offshore oil area. It is virtually impossible for an attorney faced with an indemnity agreement without the "talismanic words" to give a valid opinion to his client. Because of this problem, settlement of indemnity issues is made difficult, if not impossible, and resort must be had to the Courts. The comparative negligence approach in *Seckinger* can solve these problems.

Seckinger, of course, involved contractual indemnity, but there is no theoretical basis for not extending the holding to the area of implied of tort indemnity. If comparative negligence is the rule, a court will not be faced with distinctions between active and passive negligence, primary and secondary negligence, and a trial court will be relieved of the impossible and unenviable task of attemptng to instruct a jury on these artificial concepts.

CONCLUSION

This case involves important concepts of admiralty law which require the decision of this Court and, therefore, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

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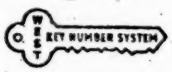
CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari has been served on counsel for all parties to this action by depositing same in the United States Mail, first class postage prepaid, this ____ day of _____, 1970.



TRANSCONTINENTAL GAS PIPE LINE CORPORATION

v.

The Mobile Drilling BARGE or VESSEL known as MR. CHARLIE, her engines, etc., et al.

Civ. A. No. 67-32.

United States District Court
E. D. Louisiana,
New Orleans Division.
Dec. 30, 1968.

Action by pipeline owner against parties to oil and gas lease operating agreement and barge owner for damages to pipeline sustained during drilling operations. The District Court, Mitchell, J., held, inter alia, that evidence established that oil company selected under operating agreement to determine drilling site was negligent in selecting and precising location of proposed well without making any check as to the existence and location of pipeline within area and that such negligence was a proximate cause of damage to pipeline as a result of drilling at the selected site.

Judgment in favor of plaintiff in accordance with opinion.

1. Mines and Minerals ⇐121

Where under terms of oil and gas lease operating agreement particular oil company was given the exclusive determination of site for drilling, other parties were justified in relying on selected oil company to carefully check for any underwater obstructions that might render site unsafe or improper and there was no negligence on part of other parties to agreement which in any way caused or contributed to damage to buried gas pipelines as result of drilling on site determined by company selected under agreement for such purpose.

2. Indemnity ⇐8

Notwithstanding lack of any negligence by those parties to oil and gas lease operating agreement under which one company had the exclusive right to select and determine drilling site, since under terms of agreement each party agreed to prorate among themselves any liability of selected company to third party, any sum selected company might be held liable for because of damage to buried gas pipeline caused by drilling on selected site would be borne by other parties to agreement pro rata.

3. Mines and Minerals ⇐125

Evidence established that oil company selected under operating agreement to determine drilling site was negligent in selecting and precising location of proposed well without making any check as to the existence and location of pipeline within area and that such negligence was a proximate cause of damage to pipeline as a result of drilling at the selected site.

4. Shipping ⇐86(2¼)

Where moving vessel collides with fixed object there is a presumption of negligence or fault on part of moving vessel.

5. Navigable Waters ⇐22(6)

Where submersible drilling barge collided with gas pipeline, burden was upon owner and operator of barge to

show that the vessel and those in charge of her navigation were without fault.

6. Navigable Waters ⇐22(6)

Where master of oil drilling barge which collided with and damaged submerged gas pipeline chose to rely upon the imprudent advice of oil company, having the exclusive right under agreement to select drill site, rather than to make his own careful, independent check as to possible existence of pipelines in immediate vicinity of well site, owner of barge failed to rebut presumption that its vessel was at fault, and negligence on part of vessel and those in charge contributed to causing her to be submerged onto pipeline resulting in damage to pipeline.

7. Indemnity ⇐13(2)

Negligence of master of oil drilling barge in failing to make more exhaustive inquiry as to existence of possible pipelines in vicinity of well drilling site which contributed to causing barge to be submerged onto pipeline which was damaged was minor in nature prior to negligence of oil company which under operating agreement had exclusive right to determine drilling site, so that barge owner had full right of recovery against selected oil company for any liability of barge owner or barge in rem to pipeline owner in absence of consideration of any indemnity and/or insurance provisions in contract between barge owner and selected company.

8. Indemnity ⇐8

Under indemnity provision in contract between oil well drilling barge owner and company designated under operating agreement to supervise operation and select site whereby barge owner undertook to indemnify selected company and its colessees for damages and liabilities arising out of or being incident to operations of barge owner and resulting from negligence or willful misconduct of barge owner or its officers, agents, or employees, barge owner was not required to indemnify selected company and colessee for damages to pipeline as a result of barge being submerged thereon at site selected by company without checking the existence of pipelines in area.

9. Contracts ⇐155

Contract must be construed against party who drafted it.

10. Interest ⇐39(2)
Mines and Minerals ⇐125

Gas pipeline owner was entitled to recover its provable damages to pipeline from supervising company under oil and gas operating agreement and owner of barge which had been submerged onto pipeline together with interest on damages at the rate of 5% from date pipeline owner made payment for cost of repairs to pipeline until payment of judgment.

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Bernard, Micholet & Cassisa, Paul V. Cassisa, New Orleans, La., Trial Atty., Vinson, Elkins, Weems & Searls, William R. Eckhardt, Houston, Tex., for Louisiana Land & Exploration Co., Exchange Oil & Gas Co., Amerada Petroleum Corp., and Preston Oil Co.

Butler, Binion, Rice, Cook & Knapp, Houston, Tex., Frank J. Knapp and Fletcher Etheridge, Houston, Tex., of counsel, and Jas. W. Tranchin, of Hammett, Leake & Hammett, New Orleans, La., for Forest Oil Corp., and Dorn & Miller Co., third-party defendants.

Bean & Manning, Houston, Tex., Frank M. Bean, Houston, Tex., of counsel, and Bruce J. Borrello, New Orleans, La., for Texas Gas Exploration Corp.

MITCHELL, District Judge.

This suit involves the following corporations, hereinafter referred to by the

abbreviations appearing in parentheses after each:

Amerada Petroleum Corporation (AMERADA)

Dorn & Miller (D&M)

Exchange Oil & Gas Company (EXCHANGE)

Forest Oil Corporation (FOREST)

Louisiana Land and Exploration Company (LL&E)

Ocean Drilling & Exploration Company (ODECO)

Preston Oil Company (PRESTON)

Signal Oil and Gas Company (SIGNAL)

Texas Gas Exploration Corporation (TGE) and

Transcontinental Gas Pipe Line Corporation (TRANSCO).

The casualty complained of occurred in the Eugene Island Area, off the Louisiana Coast in the Gulf of Mexico, each segment of which is approximately three miles square and designated a Block, by number. The location and borderline of each Block is reflected on well recognized maps used by the various agencies of the United States of America and the State of Louisiana, as well as the oil industry, in connection with oil and gas leasing, exploration and production in the offshore waters of the Gulf of Mexico.

Sometime in July, 1963, TRANSCO, plaintiff herein, secured all required permits and rights-of-way for the construction (laying) of a twenty inch gas pipe line across the floor of the Gulf of Mexico, offshore in the Eugene Island Area.

TRANSCO's pipe line was buried about five feet under the floor of the Gulf running diagonally across Block 106 in a northwest/southeast direction.

Sometime prior to 1963 FOREST obtained from the United States an oil and gas lease covering Block 106. On or about January 7, 1966, FOREST entered into an Operating Agreement with SIGNAL, LL&E, EXCHANGE, AMERADA, PRESTON, TGE and D&M under the terms of which one or more wells would be drilled in Block 106, the respective rights and liabilities of the participating parties being clearly defined therein, SIGNAL being designated as Operator.

On or about October 29, 1965, SIGNAL, for the benefit of itself and the other parties to the agreement, entered into a contract with ODECO, pursuant to which ODECO agreed to drill a well at a location 6,700 feet south and 4,000 feet west of the northeast corner of Block 106. This contract, designated in the record as the Drilling and Rework Contract, called for the use of a submersible type drilling barge known as the Mr. Charlie in the drilling of the proposed well.

The Mr. Charlie, at all times material hereto owned, operated and navigated by ODECO, is a submersible, flat bottom drilling barge equipped with steel "stabilizing skirts" affixed to, and running along her bottom on both her port and starboard sides. They extended downward (below her bottom) approximately five feet. The Mr. Charlie is without motive power and must be towed or moved by tugs when afloat. When being raised, lowered, or moved from one location to another, she is in command of an employee of ODECO, variously referred to as the barge operator, barge mover or captain who, at all times material hereto, was Steve Vorenkamp, a regular employee of ODECO.

Pursuant to the contract, and through the use of tugs paid for by SIGNAL, the Mr. Charlie, under Vorenkamp's control, was towed to the drill site designated in the contract, the exact location previously having been surveyed and buoyed by Surveyors, Inc., an independent surveying company, engaged and paid by SIGNAL.

When the Mr. Charlie arrived in the proximity of the drill site, Surveyors' employees gave Vorenkamp advice necessary to enable him to position the Mr. Charlie's drilling slot within fifty feet of the buoyed location, that being the

tolerance or variation acceptable in the industry. The final resting position of the barge in relation to the position called for in the contract was thereupon approved by SIGNAL's representative, who was aboard the Mr. Charlie. After being positioned on January 8, 1966, the tanks of the Mr. Charlie were flooded and she was submerged so as to rest on the bed of the Gulf. Thereafter, normal drilling operations commenced and continued until the morning of January 12, 1966, by which time the well was down to a depth of over 5,000 feet.

On or about January 12, 1966, (through means never brought out during the trial) it was discovered that the Mr. Charlie lay almost directly across TRANSCO's gas pipe line, in such a manner that her stabilizing skirts rested on and made contact therewith, causing the damage of which complaint is herein made.

On or about January 12, 1967, TRANSCO filed this complaint, *in rem*, against the Mr. Charlie, her engines, tackle, apparel, etc., for the damage allegedly sustained by its pipe line as a result of the Mr. Charlie resting on it. Admiralty and maritime jurisdiction of this Court was alleged and admitted by all parties.

ODECO filed claim as owner of the Mr. Charlie, answered the complaint and thereafter filed third party complaints against FOREST, SIGNAL, LL&E, EXCHANGE, AMERADA, PRESTON, TGE and D&M. All third party defendants answered both the original and third party complaints.

The matter came on for trial before this Court during the period September 23–26, 1968, inclusive. Upon completion of testimony and oral argument, the Court, from the bench, orally announced its reasons for judgment, and directed the parties to submit proposed findings of fact and conclusions of law. After receiving and considering those proposed, the Court now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

I.

At all times material hereto TRANSCO was the sole owner of a twenty inch gas pipe line transversing Block 106 of the Eugene Island Area in the Gulf of Mexico, off the coast of the State of Louisiana. Prior to construction of the pipe line, TRANSCO obtained all proper and necessary permits and rights-of-way. The location, depth and course of the pipe line, as laid, corresponded in all respects with the permits and authorizations granted by state and federal agencies, and the existence and location of the pipe line, at the time of this occurrence, were clearly reflected on numerous maps, charts and drawings which TRANSCO was required to file with state and federal agencies having jurisdiction over such matters. The maps, charts and drawings showing the exact location of TRANSCO's pipe line were on file with (among other agencies) the Bureau of Land Management, United States Department of Interior; the United States Army Corps of Engineers; and the Louisiana Department of Conservation, and were readily accessible and available to the public, including all parties hereto, at all times.

TRANSCO was wholly without knowledge of the contemplated drilling of instant oil well in Block 106 and there is no suggestion whatsoever of any negligence or fault on its part.

2.

Prior to the construction of its pipe line, and prior to the date FOREST assigned an interest in its lease to SIGNAL and others, FOREST, as required by law (as holder of a lease to be transversed by the pipe line), was given actual notice by TRANSCO of the proposed location of its pipe line across Block 106. There is no evidence that FOREST did or did not notify SIGNAL of receipt of notice of the proposed location of TRANSCO's pipe line, or its subsequent existence across Block 106.

3.

The third party defendants, other than FOREST, did not acquire their interest in the lease and the proposed well until after TRANSCO had completed construction of its pipe line across Block 106 and, accordingly, they were not given notice by TRANSCO of the proposed location of the pipe line.

4.

At all times material hereto ODECO and third party defendants SIGNAL, FOREST and LL&E, had in their possession small scale maps showing the general location of the pipe line across Block 106. Information as to its exact location was a matter of public record and readily obtainable from the Bureau of Land Management of the Department of the Interior, the Louisiana Department of Conservation or TRANSCO, as well as from other sources.

5.

Under its contract with ODECO, SIGNAL undertook the following obligations: surveying, marking and/or buoying the well site; obtaining necessary permits, etc., incident to the drilling of the well; providing competent surveyors to survey the drilling barge onto the buoyed well site, and to provide tugs to move the barge to the new location and maneuver her into position.

6.

The contract between SIGNAL (Company) and ODECO (Contractor) contained the following commitment regarding insurance to be provided:

"Article 3.3(i):

"To protect Company against liability for damage * * * to property * * * of any person * * * arising in any way out of, in connection with or resulting from the work provided for hereunder * * * Contractor shall, during the progress of the work and throughout the term of this Contract, carry and maintain, at its sole expense, in reliable insurance companies acceptable to Company * * * the minimum insurance coverages set forth in Exhibit B, annexed hereto and made a part of this Contract. * * *"[1]

Paragraph E of Exhibit B to the contract contained the following indemnity agreement:

"Contractor shall indemnify and hold harmless Company and its co-lessees from damages and liabilities of every kind arising out of or being incident to the operations of Contractor hereunder and resulting from the negligence or willful misconduct of Contractor or its officers, agents or employees. Contractor shall furnish Company with certificates evidencing coverage insuring this hold harmless agreement * * * Such insurance shall contain an agreement whereby the insurer waives its right of subrogation against Company and its co-lessees."

7.

Prior to January 6, 1966, SIGNAL had drilled two wells in Block 106, the well involved in this litigation being well No. 3. The desired location for well No. 3 was fixed by SIGNAL's exploration department, on the basis of geological information and other data obtained by it, and that department submitted its recommendation for the location of well No. 3 to SIGNAL's co-lessees under the Operating Agreement, all of whom approved it. No one acting on behalf of SIGNAL made any check as to the existence or location of any underwater pipe lines or other underwater obstructions in the area of the site of proposed well No. 3. So far as the evidence reveals, none of SIGNAL's co-lessees made any such check before approving the proposed location.

8.

Except as hereinafter noted as regards questions asked by Mr. Vorenkamp, no one acting on behalf of ODECO made any kind of check or inquiry as to

1. Omission of irrelevant portion of text indicated by ellipses.

the existence or location of any underwater pipe lines or other underwater obstructions in the proposed area of well No. 3, even though the exact location of proposed well No. 3 within Block 106 was clearly set forth in the contract of October 29, 1965, between SIGNAL and ODECO.

9.

Surveyors, Inc. was engaged by and on behalf of SIGNAL to survey, mark and/or buoy the exact location of the proposed well, and to assist in surveying the barge onto that exact location. Surveyors was the agent and servant of SIGNAL in performing all of these duties and was not the agent, servant or employee of ODECO.

10.

Surveyors buoyed the proposed well location in virtually the precise spot called for in the contract, and thereafter surveyed in the barge to a position which would place its drilling slot within a distance of approximately 50 feet of the exact spot, a variation entirely acceptable to, and approved by, SIGNAL before the barge was submerged.

Accordingly, the Court finds that ODECO did, for all practical purposes, submerge the Mr. Charlie in the exact position called for in the contract.

11.

The Court finds that Vorenkamp was in charge (master) of the Mr. Charlie during her movement to the well site and while she was being submerged and, thus, responsible for the barge's navigation as such.

12.

Prior to the time that the Mr. Charlie started moving to Block 106, Vorenkamp knew of the existence of a gas pipe line running through Block 106 and that the well site to which the Mr. Charlie was being moved was within that block.

13.

Although Vorenkamp did not know the exact location of the well site within Block 106, before submerging the barge he readily could have ascertained, either from information on board or from his shore office, the precise location of the well site within Block 106.

14.

At or about the time the barge arrived on location, Vorenkamp, realizing the existence of a pipe line running somewhere through Block 106, asked Perrin Powell, Surveyors' party chief who was on board the Mr. Charlie, whether Powell knew of any underwater pipe lines or obstructions in that area. Powell advised him that "he did not know of any". Vorenkamp then directed Powell to inquire of one Hoffpauir, SIGNAL's tool pusher who was on board the Mr. Charlie, as to whether Hoffpauir knew of any pipe lines in the area. Hoffpauir's reply (relayed to Vorenkamp by Powell) was "I know of none". In spite of these equivocal replies to his inquiries, Vorenkamp made no further efforts to more definitely ascertain whether the pipe line running through Block 106 was in the immediate area where the barge was to be submerged.

15.

SIGNAL selected the location for the site of well No. 3 in Block 106, and did all original planning for the well. The precise location of well No. 3 was selected by SIGNAL sometime prior to the execution of the contract between SIGNAL and ODECO, as evidenced by the fact that the exact location of the well was specifically set forth in the contract. Accordingly, SIGNAL planned and selected the precise location where well No. 3 ultimately was drilled, without making any check as to the existence of pipe lines or other obstructions within that area.

CONCLUSIONS OF LAW

1.

This Court has jurisdiction of this action as an admiralty and maritime claim and venue is properly laid in the Eastern District of Louisiana.

2.

TRANSCO's gas pipe line was properly laid, in accordance with proper permits, and TRANSCO was not guilty of any fault or neglect which in any manner contributed to the damage sustained by its pipe line.

3.

[1] Since the planning of well No. 3 and the selection of its site were matters left to the exclusive determination of SIGNAL under the terms of the Operating Agreement, the Court concludes that the parties to that agreement, other than SIGNAL, were justified in relying on SIGNAL to make careful check for any underwater obstructions which might render that site unsafe or improper. We find no negligence on the part of TGE, D&M, FOREST, LL&E, EXCHANGE, AMERADA or PRESTON which in any way caused or contributed to this accident so as to render any of those party defendants liable directly to either TRANSCO or ODECO.

4.

[2] Notwithstanding, under the terms of the Operating Agreement, each of the parties thereto agreed to prorate among themselves (on percentages clearly set forth therein) the manner in which any liability of SIGNAL, as Operator, to third parties should be borne. Accordingly, as to any sum for which SIGNAL may be held liable to either TRANSCO and/or ODECO, SIGNAL has the right, under the terms of the Operating Agreement, to recoup from each of the other parties thereto their pro-rata share of such liability.

5.

[3] SIGNAL was negligent in the planning, as distinguished from the operations (later performed under the contract with ODECO) stage of this well, in that in selecting and precising the location of the proposed well SIGNAL negligently failed to make any check whatsoever as to the existence and/or location of TRANSCO's (or any other) pipe line within the area. SIGNAL selected a site in complete disregard of the vested rights of parties not privy to either its contract with ODECO or the Operating Agreement. Such negligence was a proximate cause of TRANSCO's damages and SIGNAL is directly liable, under the pleadings and proof, to TRANSCO for the latter's provable damages. Further, SIGNAL is liable to ODECO for any sums ODECO is required to pay TRANSCO on behalf of itself (ODECO) and its barge, or either of them, under the provisions of the judgment hereinafter provided for.

6.

[4, 5] Where (as here) a moving vessel (the Mr. Charlie) collides with a fixed object (TRANSCO's pipe line), there is a presumption of negligence or fault on the part of the moving vessel. Without question, the presumption of negligence on the part of the Mr. Charlie for hitting the pipe line has been validly sustained; the very fact that the collision occurred placed the burden upon ODECO (as her claimant-owner and operator) to show that the vessel, and those in charge of her navigation, were without fault. Vorenkamp, her master, failed to make adequate check regarding the existence and location of TRANSCO's pipe line in the immediate vicinity of the well site. Actually, he navigated his vessel in accordance with advice and instructions given him by SIGNAL and, clearly, such advice and instructions (to set the barge down at the particular location) were most imprudent.

[6] Vorenkamp chose to rely on SIGNAL's imprudent advice and instructions rather than to make his own careful, independent check, placing SIGNAL somewhat in the position of a pilot who advises the master of a vessel as to the proper course through which to maneuver his vessel. A master is in command of his vessel at all times and, therefore, may elect to follow the instructions given by the pilot, or refuse to do so and act upon his own knowledge and infor-

mation. If the master elects to follow advice or instruction given by the pilot, and that advice later proves to be erroneous or negligent, the vessel is nevertheless liable "*in rem*" for damages resulting from its collision with another vessel or fixed object.

Accordingly, the Court finds that ODECO (as claimant-owner) has failed to rebut the presumption that its vessel was at fault and that Vorenkamp, her master who was in charge of her navigation, was negligent in failing to make further, more exhaustive inquiry than he did regarding the existence of TRANSCO's pipe line at or near the drilling site. Such negligence on the part of the Mr. Charlie and those in charge of her operation contributed to causing her to be submerged onto TRANSCO's pipe line, resulting in damage to the latter.

7.

[7] Vorenkamp's negligence in failing to make more exhaustive inquiry than he did regarding the existence or non-existence of pipe lines in the area, and/or in failing to conceive the error in the instructions given him by SIGNAL, were minor in nature, whereas the negligence of SIGNAL was major in nature. Accordingly; the Court, under the major-minor fault doctrine, concludes that the negligence of SIGNAL was such as to give ODECO, claimant-owner of the Mr. Charlie, full right of recovery over against SIGNAL for any liability of ODECO or the Mr. Charlie, *in rem*, to TRANSCO, unless such right to recover over against SIGNAL is altered by the terms of the indemnity and/or insurance provisions contained in the contract between ODECO and SIGNAL. The effect of these provisions of the contract on ODECO's right to recover over are discussed hereinafter.

8.

[8] Turning to the effect of the indemnity provisions contained in the contract between SIGNAL and ODECO (paragraph E of Exhibit B thereto), ODECO agreed to indemnify SIGNAL and its co-lessees from damages and liabilities "arising out of or being *incident to the operations of Contractor* hereunder and resulting from the *negligence or willful misconduct of Contractor* or its officers, agents or employees," (emphasis added). The liability of SIGNAL here did not arise out of the operations of the contractor (ODECO) so as to give SIGNAL et al. a right to indemnity from ODECO. This is a case of planning negligence on the part of SIGNAL, i. e., in the planning of a proper well site. Such planning was not part of ODECO's operation or responsibility. It was SIGNAL's alone.

The indemnity provision clearly reflects the intent on the part of ODECO to indemnify SIGNAL *only* for liabilities of SIGNAL *arising out of ODECO's operations hereunder and resulting from the negligent conduct of ODECO*, (emphasis added). The indemnity clause specifies "negligence or willful misconduct" of contractor (ODECO) and these words would not indicate any intent of the parties to require ODECO to indemnify SIGNAL for ODECO's negligence in relying upon SIGNAL to properly plan the well location. The operations of Contractor (ODECO) did not commence (insofar as they appertain to the indemnity clause) until the barge had been properly positioned over the precise spot designated by SIGNAL and submerged thereon in the normal manner. By the time these events had occurred the damage to plaintiff's pipe line had also occurred.

[9] SIGNAL prepared the contract, including the indemnity provisions, and the latter reflect no intent of the parties to require ODECO to indemnify SIGNAL for damages resulting from SIGNAL's negligence. Indeed, if it had been SIGNAL's intent to provide for indemnity despite negligence on its part, it would have been a very simple matter to do so. However, such was not done and the contract must be construed against the party who drafted it, SIG-

NAL.[2] Therefore, SIGNAL is not entitled to indemnity from ODECO under the terms of the indemnity provision.

9.

Article 3.3(i) of the contract dealing with insurance coverages to be provided by ODECO presents a more difficult question. The insurance which ODECO agreed by the contract to provide for the protection of SIGNAL, was such as would protect SIGNAL from liability for damage to property of any person arising out of, or incident to, the operations of ODECO.

However, no insurance company is a party to this litigation and, so far as the record reveals, there has been no breach on the part of ODECO of its duty to provide the insurance coverages called for in Article 3.3(i). Further, the record is silent as to whether or not SIGNAL ever made claim against the Underwriters issuing the policies obtained by ODECO under the provisions of Article 3.3(i), or ever requested such Underwriters to defend SIGNAL against the claim asserted by TRANSCO. The Court is, therefore, of the opinion that it does not now have before it the question of whether or not the Underwriters issuing the coverages called for under Article 3.3(i) are liable to SIGNAL for the damages ultimately awarded to TRANSCO from SIGNAL, as opposed to the possible uninsured liability of SIGNAL for such damages, or the potential liability of other Underwriters independently selected by SIGNAL.

10.

[10] Since the right of TRANSCO to recover its provable damages from one or more of the defendants in this litigation has never been seriously questioned, it is apparent that TRANSCO has been required to await recovery of its damages from the defendants held liable herein only because of the dispute between said defendants as to the party or parties who might ultimately be liable to TRANSCO for its damages. Accordingly, TRANSCO is entitled to recover its provable damages from SIGNAL and ODECO (as claimant-owner of the Drilling Barge Mr. Charlie) together with interest on said damages, at the rate of five per centum (5%) per annum, from the date that it made payment for the cost of repairs to its pipe line until payment of the judgment entered herein.

11.

The drilling/re-work contract executed by and between SIGNAL as "Company" and ODECO as "Contractor" was and is a duly executed, valid and subsisting agreement, enforceable according to its terms.

Let judgment be entered in favor of Transcontinental Gas Pipe Line Corporation and against Signal Oil and Gas Company and against the Drilling Barge Mr. Charlie, *in rem*, jointly and severally, for the provable damages established by TRANSCO, plus interest on such sum from the date of payment of repairs to its pipe line until payment of said judgment, together with all costs of court.

Let judgment be entered over in favor of Ocean Drilling and Exploration Company, as claimant-owner of the Drilling Barge Mr. Charlie, and against Signal Oil and Gas Company for any sums required to be paid by ODECO and/or the Mr. Charlie to TRANSCO under the provisions of this judgment.

Let judgment be entered in favor of third party defendants Forest Oil Corporation, Louisiana Land and Exploration Company, Exchange Oil and Gas Company, Amerada Petroleum Corporation, Preston Oil Company, Texas Gas

2. Halliburton Oil Well Cement Company v. Paulk, 180 F.2d 79 (CA 5–1950); James F. O'Neil Company, Inc. v. United States Fidelity and Guaranty Company, 381 F.2d 783 (CA 5–1967); Grigsby v. Constal Marine Service of Texas, 235 F.Supp. 97 (WD La.–1964); Mills v. Fidelity and Casualty Company of New York, 226 F. Supp. 786 (WD La.–1964); Despaux v. The California Company, 286 F.Supp. 558 (ED La.–1968).

Exploration Corporation and Dorn & Miller, dismissing, with prejudice, the complaint of TRANSCO, and the third party complaint of ODECO, against said third party defendants, and decreeing that these third party defendants recover their costs from ODECO and SIGNAL, jointly and severally.

Let judgment be entered in favor of Signal Oil and Gas Company against each of said other third party defendants for that portion of the amounts required to be paid by SIGNAL under the provisions of the judgment herein which each such third party defendant has agreed to pay under the terms of the Operating Agreement.

Counsel for TRANSCO will prepare and submit appropriate Interlocutory Decree to accomplish the above within ten (10) days of entry of these findings of fact and conclusions of law.

If the parties hereto are unable to agree upon the quantum of damages sustained by TRANSCO within sixty (60) days from the date of entry of the Interlocutory Decree, the Court will appoint a Commissioner to hear evidence on, and determine the amount of, damages sustained by TRANSCO.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27827

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioner-Appellee,

versus

THE MOBILE DRILLING BARGE OR VESSEL KNOWN AS "MR. CHARLIE" etc.,
Defendant,

SIGNAL OIL & GAS COMPANY, ET AL.,
Third Party Defendant-Appellants,

versus

OCEAN DRILLING & EXPLORATION COMPANY,
Third Party Claimant-Appellee,

FOREST OIL CORPORATION, ET AL.,
Third Party Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of Louisiana

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(April 6, 1970)

Before WISDOM and DYER, Circuit Judges, and CASSIBRY, District Judge.

DYER, Circuit Judge: This suit arose out of drilling operations being conducted in the Gulf of Mexico when the Drilling Barge "MR. CHARLIE", owned and operated by Ocean Drilling and Exploration Company (ODECO), submerged and came in contact with a Transcontinental Gas Pipe Line Corporation (TRANSCO) 20-inch gas pipe line buried in Block 106 in the Eugene Island Area of the Gulf. TRANSCO brought this suit for injury to its pipeline against the barge "MR. CHARLIE" in rem. ODECO filed claim to it and impleaded Signal Oil and Gas Company (SIGNAL), the lease operator for whom ODECO had been performing the drilling operation under a Drilling and Rework contract.

ODECO also impleaded Forest Oil Corporation (FOREST) et als., the co-owners of the lease with SIGNAL. These co-owners were not parties to the drilling contract with ODECO. There has never been any question either in the trial court or on appeal that TRANSCO is faultless and is entitled to damages; the litigation concerns only the distribution of liability among ODECO, SIGNAL and FOREST, et als.

The issue of damages was severed and the District Court entered an interlocutory decree that:

> the Drilling Barge "MR. CHARLIE" *in rem* and the third party defendant SIGNAL *in personam* are jointly and severally liable to TRANSCO for their concurrent negligence.

> the negligence of the barge was minor and that of SIGNAL major and therefore ODECO is entitled to recover from SIGNAL for any sums ODECO is required to pay TRANSCO;
>
> SIGNAL is not entitled to indemnity from ODECO under the terms of the indemnity provisions in the Drilling and Rework Contract between ODECO and SIGNAL; and
>
> the third party complaint of SIGNAL against FOREST, et als is dismissed with prejudice.[1]

We agree that SIGNAL and ODECO were concurrently negligent but find inapplicable any considerations of major-minor fault. We also agree that SIGNAL is not entitled to contractual indemnity from ODECO and that the third party complaint against FOREST and the other co-owners of the lease was properly dismissed. Accordingly, we reverse the judgment insofar as it requires SIGNAL to reimburse ODECO and affirm it in all other respects.

I.

The parties have assigned as error nearly every aspect of the District Court's order. We deal first with the contentions of SIGNAL and ODECO pertaining to

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[1] The District Court also ruled that under the terms of the operating agreement covering the lease on Block 106, FOREST and the other co-owners of the lease are liable to SIGNAL for their proportionate share of any amount SIGNAL is ultimately required to pay under the judgment. The correctness of this ruling is not questioned by any of the parties.

the findings of negligence. Each party claims that the trial court erroneously found it negligent and, in the alternative, that even if it was negligent, its negligence was only minor in comparison with that of the other party and, therefore, the other party should be solely liable for the damage to TRANSCO's pipe line.

The facts relating to this issue are largely undisputed. Prior to 1963 FOREST obtained an oil and gas lease from the United States covering Block 106. FOREST had actual notice of the location of TRANSCO's pipeline in Block 106 at the time it assigned an interest in the lease to SIGNAL and the other third party defendants. The co-owners of the lease executed a written operating agreement covering the lease and designating SIGNAL as the operator. As operator of the lease, SIGNAL executed a written Drilling and Rework Contract with ODECO[2] under which ODECO was, as an "independent contractor," to conduct the drilling operation out of which TRANSCO's damage arose.

The drilling location was selected by SIGNAL on the basis of geological information and approved by its co-owners on the same basis. At all material times, ODECO, SIGNAL and FOREST had in their possession small-scale maps showing the general location of TRANSCO's line across Block 106. Information as to its exact location was readily available as it is a matter of public record reflected on maps and charts on file

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[2]The indemnity provisions of this contract are discussed in Part II of the opinion, *infra*.

in various appropriate governmental agencies.[3] No one on behalf of SIGNAL made any check for the existence of pipe lines or other underwater obstructions at the drilling location.

Pursuant to a requirement of the Drilling and Rework Contract between SIGNAL and ODECO that SIGNAL survey, stake and mark the proposed drilling location, SIGNAL hired Surveys, Inc. to plot and buoy the location of the proposed well and to "survey" "MR. CHARLIE" into the proper location for drilling. Mr. Powell, a Surveys, Inc. employee, was on board "MR. CHARLIE" the night it was being moved to the drilling location in Block 106 and he directed the barge to that location.

ODECO's director of safety testified that ODECO drilling barges had previously set down on at least a dozen pipe lines of more than 2 inches in diameter within the five or six years preceding the casualty involved in this case, that it was incumbent on the barge mover to find out if there was a pipe line in the drilling area and that he should look at a map before moving into a particular block to put a drilling barge on a drilling location. ODECO had maps of Block 106 in its office.

Vorenkamp, ODECO's barge mover, testified that he did not look at any maps before going on board the barge and that although he had some maps reflect-

[3]Among these agencies are the United States Department of Interior, the United States Army Corps of Engineers, and the Louisiana Department of Conservation.

ing the location of TRANSCO's pipe line in Block 106 in his briefcase on board the barge, he did not recall looking at them either. He also admitted having personal knowledge that TRANSCO had a pipe line running through Block 106, which encompasses an area of approximately 3 square miles, but that he nevertheless did not know where in Block 106 the drilling location was or where he was when he set down the barge. He relied on Powell, the employee of Survey's, Inc., to get him to the location. The only check Vorenkamp made with respect to the existence of a pipe line at the drilling location came when the barge was en route to the location. He asked the surveyor, Powell, and SIGNAL's drilling foreman who was on board, if they knew of any pipe lines in the area and both answered that they did not know of any. Vorenkamp did not ask either Powell or the drilling foreman whether they knew if SIGNAL or Surveys, Inc. had made a check for pipe lines.

SIGNAL argues that it had no duty to check for the existence of pipe lines and that it therefore cannot be held negligent in planning for the drilling of the well. SIGNAL contends that by accepting the responsibility under the contract to drill at a specified location, ODECO assumed any responsibility for mishaps occasioned thereby. ODECO, on the other hand, argues that it had a right to rely on SIGNAL's expertise and that it cannot be held negligent because it fulfilled any duties it had when it set the barge down on the precise location called for in the contract. We think each party had a duty which it breached.

Many theories have been advanced in this case to support SIGNAL's and ODECO's contention that only the other of them is liable. For example, the District Court found ODECO negligent by virtue of the presumption of negligence which arises when a moving vessel collides with a fixed object. The parties themselves have resorted to analogy, each side arguing that the relative liabilities of a landowner or architect when a building contractor strikes underground pipes is analogous to the present situation. In view of the nature of the facts in this case, however, we pretermit any consideration as to the pertinency or applicability of either the presumption used by the District Court or the analogy suggested by the parties. That both SIGNAL and ODECO were negligent and that the negligence of each party was a direct and proximate cause of the injury to TRANSCO's pipe line is clear to us from the facts in this record.

There is conflicting testimony in the record concerning whether it is the custom in the industry for the lease operator to inspect for submerged pipe lines and to convey such information to the drilling contractor. Regardless of the existence or absence of such a custom, it is inconceivable to us that a lease operator can plan a drilling site in total disregard of the rights of owners of underground pipe lines. All the pertinent information as to the existence and location of the lines was both in SIGNAL's hands and easily available as a matter of public information. We need not decide to what extent a lease operator must go to fulfill its duty to innocent third parties like TRANSCO because SIGNAL took no steps whatever. Even assuming that

the duty not to hit the pipe lines is delegable,[4] SIGNAL did not delegate to ODECO in the Drilling and Rework Contract the responsibility of ascertaining the existence and location of submerged pipe lines. SIGNAL did not even put ODECO on notice that it had made no check for the existence of underwater obstructions or submerged pipe lines.

We need not decide either what extent, if any, a drilling company is justified in relying on the lease operator's selection of the drilling site. In this case Vorenkamp, ODECO's barge mover, went into Block 106 with actual knowledge of the existence of TRANSCO's pipe line and set his barge down without knowing where he was in relation to the pipe line. Vorenkamp asked Powell and Signal's drilling foreman if *they* knew of any pipe lines in the drilling area and got an equivocal answer from each that they did not know of any. He did not ask if SIGNAL or Surveys, Inc. had made any inquiry, but was apparently content to assume SIGNAL had made such an inquiry notwithstanding that he had the means at hand to make his own independent inquiry.

Although ODECO's negligence was later in time than SIGNAL's we reject SIGNAL's contention that its negligence was merely a condition which made it possible for the subsequent negligence of ODECO to cause the casualty. We think SIGNAL's negligence was also a *cause* of the accident. A prior act of negligence is a proximate cause of an injury despite the occurrence

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[4]Since it is not necessary for resolution of this case, we do not decide whether this duty is delegable or not.

of a second causative act when the second negligent act might reasonably have been expected to occur. W. Prosser, *Law of Torts* § 51 at 313-14 (1964). Here SIGNAL was negligent in failing to inspect for pipe lines. ODECO's negligence consisted of reliance on SIGNAL's selection of the drilling site. This reliance might reasonably have been expected to occur. SIGNAL's act is thus a direct and proximate cause of the damage to the pipe line.

The District Court correctly held SIGNAL and ODECO jointly and severally liable to TRANSCO for damage to the pipe line.

II.

Having determined that SIGNAL and ODECO were both negligent and that the negligence of each was a proximate cause of the injury to the TRANSCO pipe line, we turn our attention to the proper distribution of the liability as between SIGNAL and ODECO.

Major-Minor Fault.

Our first inquiry centers upon the District Court's holding that ODECO's negligence was minor and SIGNAL's major and that, therefore, ODECO is entitled to recover from SIGNAL for any sums ODECO is required to pay TRANSCO. We do not dwell long on this point because we think the major-minor fault doctrine inapplicable to this case.

The major-minor fault doctrine is applied in cases involving a collision between vessels to relieve a party whose fault was only technical from the harshness of the divided damages rule. G. Gilmore and C. Black, *The Law of Admiralty* 402-03 (1957). This ancient doctrine has never been applied in non-collision cases. *Halcyon Lines v. Haenn Ship Corp.*, 1952, 342 U.S. 282, 72 S.Ct. 277, 96 L.Ed. 318; *Empire Seafoods, Inc. v. Anderson*, 5 Cir. 1968, 398 F.2d 204;[5] *cert. denied* 393 U.S. 222, 89 S.Ct. 449, 21 L.Ed.2d 91. It may be that the setting down of a submersible drilling barge in such a way that it comes in contact with and damages a submerged pipe line is a "collision" in the technical sense of that word. In our view, though, it does not constitute a "collision" between vessels for purposes of application of the divided damages rule or its corollary, the major-minor fault doctrine.[6]

Contractual Indemnity.

Our second inquiry into the distribution of liability focuses upon the indemnity provisions of the Drilling

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[5] *Empire Seafoods* found there was a "collision" for purposes of applying the divided damages rule even though a bridge and a vessel, rather than two vessels, were involved. The bridge was treated as if it were another vessel because of the application of the Admiralty Jurisdiction Extension Act, 46 U.S.C.A. § 740, and the Limitation Act, 46 U.S.C.A. § 185.

[6] SIGNAL has argued, apart from any questions of indemity, that the District Court erred in holding it and ODECO jointly and severally liable for the entire damages to TRANSCO and that each party should be only primarily responsible for its fraction of the damages (i.e., one-half) and secondarily responsible for the other party's fraction. However, since we have found no "collision" for purposes of applying the divided damages rule, SIGNAL's argument is inapposite.

and Rework Contract under which ODECO was performing the drilling operation for SIGNAL. In Article 3.3(1) of the contract ODECO, as the Contractor, agreed:

> To protect Company [SIGNAL] against liability for damage, loss or expense arising from damage to property or injury or death of any person or persons arising in any way out of, in connection with or resulting from the work provided for hereunder and, without limiting any of Contractor's obligations or liabilities under this contract, Contractor shall, during the progress of the work and throughout the term of this contract, carry and maintain, at its sole expense, in reliable insurance companies ... the minimum insurance coverages set forth in Exhibit B, annexed hereto and made a part of this contract for all purposes...

Paragraph E of Exhibit B referred to provides:

> Contractor shall indemnify and hold harmless Company and its co-lessees from damages and liabilities of every kind arising out of or being incident to the operations of Contractor hereunder and *resulting from the negligence or willful misconduct of Contractor or its officers, agents or employees.* Contractor shall furnish Company with certificates evidencing coverage insuring *this* hold harmless agreement .... Such insurance shall contain an agreement whereby the insurer waives its right of

subrogation against Company and its co-lessees. (Emphasis added).

The District Court denied indemnity under the contract provisions on the alternative grounds that (1) ODECO's operations insofar as they appertain to the indemnity clause did not commence until the barge had been properly positioned over the precise spot designated by SIGNAL and submerged thereon in the normal manner, and by the time these events had occurred the damage to TRANSCO's pipe line had also occurred; and, in any event, (2) the indemnity provision does not reflect an intent on the part of ODECO to indemnify SIGNAL for liabilities incurred by SIGNAL as the result of ODECO's reliance upon SIGNAL to properly plan the well location.

We think the operations under the contract insofar as they appertain to the indemnity clause had begun at the time in question. The contract called for payment to begin accruing to ODECO on an hourly basis from the time the barge "MR. CHARLIE" left to go to Block 106. Furthermore, damage caused by the submerging of the barge into the position called for in the contract is a damage "arising out of or being incident to the operations of" ODECO within the meaning of the indemnity provisions.

Finding that the indemnity provisions were in effect at the time of the injury to TRANSCO's pipe line, we turn now to a construction of them to ascertain whether they reflect an intent on the part of ODECO to indemnify SIGNAL under the particular facts of this

case. Of course, the construction of a maritime contract is governed by federal, not state, law. *E.g., Halliburton Company v. Norton Drilling Company*, 5 Cir. 1962, 302 F.2d 431, *cert. denied*, 374 U.S. 829; *A/S J. Ludwig Mowinckels R. v. Commercial Steve. Co.*, 2 Cir. 1958, 256 F.2d 227, *cert. dismissed*, 358 U.S. 801.

SIGNAL urges that under the indemnity provisions ODECO must indemnify it for any damages it pays to TRANSCO, plus fees, costs and interest. The fact that it is a joint tortfeasor should not, says SIGNAL, preclude indemnity under the contract. *A/S J. Ludwig Mowinckels R. v. Commercial Steve. Co., supra*, is relied on for this proposition. There, the shipowner was negligent in improper loading of the cargo. The stevedoring company, with notice of this fact, was negligent in failing to take adequate steps to insure safe unloading. The indemnity clause in the contract between the shipowner and the stevedoring company provided that the stevedore was to assume responsibility for all damage or injury occurring while loading or unloading through the stevedore's fault. The shipowner was held entitled to indemnity for damages previously paid to an employee of the stevedoring company who had been injured during the unloading. The Second Circuit rejected the stevedore's contention that the indemnity clause should be strictly construed to limit liability for indemnification to those situations where its negligence was alone responsible for the injury and held that, under the provision, full indemnity was required even though the indemnitee and indemnitor were joint tortfeasors.

It may be that the relationship of shipowner and stevedore is such that its very existence is a circumstance from which a court may infer an intent to indemnify even a joint tortfeasor. *Cf. Ryan Co. v. Pan-Atlantic Corp.*, 1956, 350 U.S. 124, 76 S.Ct. 132; 100 L.Ed. 133, where the relationship was held to give rise to an implied warranty of workmanlike service on the part of the stevedore even in the absence of an express undertaking to that effect. But even if that relationship was not a factor and *Mowinckels* therefore cannot be distinguished from the case sub judice, we do not find *Mowinckels* persuasive because of the clear precedent in this circuit governing the construction of contractual indemnity provisions.

In *Batson-Cook Company v. Industrial Steel Erectors*, 5 Cir. 1958, 257 F.2d 410 this court enunciated the rule under Alabama law, which was stated to be the same for the Fifth Circuit, that:

> [W]hile it need not be done in any particular language or form, unless the intention is unequivocally expressed in the plainest of words, the law will consider that the parties did not undertake to indemnify one against the consequences of his own negligence. *Id.* at 412.

Batson-Cook rejected the contention that the all-inclusive language of the indemnity clause — which referred to any and all losses "sustained in connection with or to have arisen out of or resulting from the performance of the work by subcontractor" — reflected with sufficient specificity an intent to impose the extreme

obligation on the indemnitor to indemnify the indemnitee for its own negligence:

> The purpose to impose this extraordinary liability on the Indemnitor must be spelled out in unmistakable terms. It cannot come from reading into the general words used the fullest meaning which lexicography would permit. *Id.* at 413.

Although in *Batson-Cook* the indemnitor was not negligent and the damage was caused solely by the negligence of the indemnitee, the rule requiring specificity of the intent to indemnify for the indemnitee's own negligence is equally applicable in situations where, as here, the concurring negligence of the indemnitee and indemnitor causes the damage. *See United States v. Seckinger*, 5 Cir. 1969, 408 F.2d 146, *cert. granted*, U.S. — (No. 395, October 13, 1969, 38 U.S.L.W. 3127).

Of course, the contract need not contain the talismanic words "'even though caused, occasioned or contributed to by the negligence, sole or concurrent of the Indemnitee,'" or like expressions, *United States v. Seckinger*, *supra*, *Batson-Cook Company v. Industrial Steel Erectors*, *supra*, but it must clearly reflect such a purpose. In this case we do not find anything either in the contract itself or in the realities of the situation from the standpoint of the parties at the time the contract was made. *Black Warrior Electric M. Corp. v. Mississippi Power Co.*, 5 Cir. 1969, 413 F.2d

1221; *United States v. Seckinger, supra;* which reflects such an intention.

The parties were in an apparently equal bargaining position and SIGNAL drafted the Drilling and Rework Contract. Nevertheless, a reading of Article 3.3(i) and paragraph E of Exhibit B together makes it clear that ODECO agreed to indemnify SIGNAL for all loss arising out of, in connection with or resulting from the drilling work, only *if "resulting from the negligence or willful misconduct of Contractor [ODECO]"*, and to provide insurance in case of any such negligence by ODECO. The language of the contract simply belies any intent to indemnify SIGNAL for any loss contributed to by SIGNAL's own negligence.[7]

The insurance in this case was not intended to cover the specific damage (regardless of fault) as in *American Agric. Chem. Co. v. Tampa Armature Works,* 5 Cir. 1963, 315 F.2d 856, or to cover the negligence of the indemnitee as in *Crescent Towing & Salvage Co. v. Dixilyn Drilling Corp.,* 5 Cir. 1962, 303 F.2d 237, *rev'd on other grounds,* 372 U.S. 697. Rather, ODECO was to furnish insurance only for its own negligence.

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[7]SIGNAL also argues that its negligence was only passive, while ODECO's was active and that SIGNAL is therefore still entitled to indemnity. Later in this opinion we hold that both parties were actively negligent. But aside from this holding, considerations of active and passive negligence are inapplicable when dealing with contractual indemnity. *Weyerhaeuser S.S. Co. v. Nacirema Co.,* 1958, 355 U.S. 563, 78 S.Ct. 438, 2 L.Ed. 2d 491; *Ryan Co. v. Pan-Atlantic Corp.,* 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133; *See Miller and Company v. Louisville & N.R. Co.,* 5 Cir. 1964, 328 F.2d 73, *cert. denied,* 377 U.S. 966.

Therefore, we find without merit SIGNAL's argument that because the parties negotiated a contract price which reflects that ODECO was to bear the cost of liability insurance, the contract also reflects an intention that ODECO bear all the liabilities.

Finding nothing either in the language of the contract itself or in the situation surrounding its making that clearly indicates an intention to indemnify for the indemnitee's negligence, we hold that SIGNAL is not entitled to indemnity under this contract.

Implied Warranty.

ODECO attempts to sustain the District Court's order requiring SIGNAL to pay ODECO any sums it pays to TRANSCO by arguing that this case is analogous to *Ryan Co. v. Pan-Atlantic Corp., supra*, where the Supreme Court held that when a shipowner is held liable for injuries to a longshoreman by virtue of an unseaworthy condition of the ship which is the result of the stevedore company's own negligent acts, the shipowner is entitled to indemnity from the stevedore on a theory of breach of implied warranty of workmanlike performance. We do not find the situations at all analogous and, as in the past, we refuse to extend *Ryan* beyond the circumstances in which it arose for the reason that the doctrine is closely tied to the obligation a shipowner owes to those employed on the vessel. *Loffland Brothers Co. v. Roberts, et al.*, 5 Cir. 1967, 386 F.2d 540, *cert. denied*, 389 U.S. 1040; *Ocean Drilling & Exploration Co. v. Berry Brothers Oil Field Service, Inc.*, 5 Cir. 1967, 377 F.2d 511, *cert. denied*,

389 U.S. 849; *see Smith Petroleum Service, Inc. v. Monsanto Chemical Co.*, 5 Cir. 1970, ____ F.2d ____ [No. 26137, January 7, 1970.]

Tort Indemnity.

ODECO also attempts to sustain the order requiring SIGNAL to make it whole by arguing that its negligence was passive or secondary while SIGNAL's was active or primary. SIGNAL, on the other hand, urges that its negligence was passive and ODECO's was active so that ODECO should be required to indemnify SIGNAL.

We disagree with both parties and find the principles of active and passive negligence inapplicable.[8] As indicated in Part I of this opinion, both SIGNAL and ODECO had a primary duty to innocent third parties like TRANSCO and both breached that duty. "As we view the facts, ... this contention [that indemnity should be allowed on the ground that one party's negligence was active and the other's passive] has no merit. [SIGNAL] and [ODECO] were in pari delicto; each was guilty of acts or omissions which could have proximately caused the [injury complained of]." *Smith Petroleum Service, Inc. v. Monsanto Chemical Co., supra* at p. 16 of slip opinion.

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[8] *Tri State Oil Tool Indus., Inc. v. Delta Marine Drill. Co.*, 5 Cir. 1969, 410 F.2d 178, 180 stated the generally recognized principle, to be "that the right of indemnity exists between parties, one of whom is guilty of active or affirmative negligence, while the other's fault is only technical or passive."

III.

The only question which remains is the propriety of the dismissal of the claims against FOREST and the other co-owners of the lease. ODECO alleged that FOREST had been negligent in failing to notify SIGNAL of TRANSCO's pipe line after FOREST was notified of the proposed well location. It is undisputed that FOREST had actual knowledge of the existence and location of the TRANSCO pipe line. However, the District Court found and ODECO admits in its brief that there was no competent evidence produced at trial as to whether FOREST did or did not notify SIGNAL at any time of the existence or location of the pipe line Accordingly, there was no evidence from which it could be inferred that FOREST was negligent.

ODECO does not take issue with the District Court's conclusion that FOREST and the other co-lessees were justified in relying on SIGNAL to make careful check for any underwater obstructions. ODECO's only argument is that because FOREST failed to call witnesses within its control who might have testified that FOREST did not notify SIGNAL of the existence and location of the pipe line, ODECO is entitled to a presumption that this would have been the tenor of such testimony. We have dealt with this same problem before:

> Unquestionably the failure of a defendant in a civil case to testify or offer other evidence within his ability to produce and which would explain or rebut a case made by the other side,

> may, in a proper case, be considered as a circumstance against him and may raise a presumption that the evidence would not be favorable to his position. [Citations omitted].
>
> It is equally well settled, however, that the failure of a party to testify and the permissible inference to be drawn therefrom will not convert evidence otherwise insufficient into a prima facie case. It will not excuse the failure of the [plaintiff] to meet the burden of establishing facts sufficient to make out a case .... *United States v. Roberson*, 5 Cir. 1956, 233 F.2d 517, 519; *accord, The A.L.B. Theatre Corporation v. Loew's Incorporated*, 7 Cir. 1966, 355 F.2d 495; *Vanity Fair Paper Mills, Inc. v. F.T.C.*, 2 Cir. 1962, 311 F.2d 480; *United States v. Cherkasky Meat Company*, 3 Cir. 1958, 259 F.2d 89; *Eckenrode v. Pennsylvania R. Co.*, 3 Cir. 1947, 164 F.2d 996; *Robins Dry Dock & Repair Co. v. Navigazione Libera Triestina*, 2 Cir. 1929, 32 F.2d 209.

There can be no inference here because neither ODECO nor TRANSCO introduced any evidence on the issue of FOREST's negligence (or the negligence of the other co-lessees).

We have considered the other contentions of the parties and find them either without merit or unnecessary to resolve in light of our disposition of the case.

The interlocutory decree of the District Court is REVERSED to the extent that it requires SIGNAL to reimburse ODECO for any sums paid by ODECO to TRANSCO. It is AFFIRMED in all other respects.

REVERSED in part and AFFIRMED in part.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1969

No. 27827

D. C. Docket No. 67-32-CA-Sec. F

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioner-Appellee,

versus

THE MOBIL DRILLING BARGE OR VESSEL KNOWN AS "MR. CHARLIE", etc.
Defendant,
SIGNAL OIL & GAS COMPANY, ET AL.,
Third Party Defendant-Appellants

versus

OCEAN DRILLING & EXPLORATION COMPANY,
Third Party Claimant-Appellee,
FOREST OIL CORPORATION, ET AL,
Third Party Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before WISDOM and DYER, Circuit Judges, and CASSIBRY, District Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed in part; and affirmed in part, in accordance with the opinion of this Court;

It is further ordered that third party defendants-appellants be condemned to pay one-half of the costs in this Court, and third party claimant-appellee be condemned to pay one-half of said costs.

April 6, 1970

Issued as Mandate: May 22, 1970

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27827

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioner-Appellee,

versus

THE MOBILE DRILLING BARGE OR VESSEL KNOWN AS "MR. CHARLIE" etc.,
Defendant,

SIGNAL OIL & GAS COMPANY, ET AL.
Third Party Defendant-Appellants,

versus

OCEAN DRILLING & EXPLORATION COMPANY,
Third Party Claimant-Appellee,

FOREST OIL CORPORATION, ET AL.,
Third Party Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Louisiana

(May 13, 1970)

ON PETITION FOR REHEARING

Before WISDOM and DYER, Circuit Judges, and Cassibry, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.